

No. 85-1277

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

**SCHOOL BOARD OF NASSAU COUNTY, FLORIDA
and CRAIG MARSH, Individually and as
Superintendent of Schools of Nassau
County, Florida**

Petitioners

vs.

GENE H. ARLINE,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

JOINT APPENDIX

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear in the following sections in the appendix to the printed Petition for Certiorari:

Findings of Fact and Final Judgement, United States District Court, Middle District of Florida, Jacksonville Division, dated November 17, 1983

Appendix C

Opinion of the United States Court of Appeals, Eleventh Circuit, dated September 30, 1985

Appendix A

Order of the United States Court of Appeals, Eleventh Circuit, denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated November 8, 1985

Appendix B

Extracts from Docket Sheet

United States District Court
Middle District of Florida
Jacksonville, Division
Case #82-305-Civ-J-JHM

March 23, 1982:	Complaint filed.
May 28, 1983:	Order: defts' motion to dismiss count one is GRANTED, with leave to amend within 20 days from date of this order. See Doyle v. University of Alabama, 680 F.2d 1323 (11th Cir. 1982); et al. In all other respects, defts' motion to dismiss is DENIED.
June 16, 1983:	Amended Complaint.
July 1, 1983:	Defts' motion to dismiss amended complaint (count I)
November 17, 1983:	RECORD OF HEARING before Hon. John H. Moore, II. Nonjury trial in open court.
November 17, 1983:	JUDGMENT ON DECISION BY THE COURT.
December 12, 1983:	Pltf's notice of appeal.

MARIANNE McEUEEN, M.D., was called as a witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION:

BY MR. PADOVANO:

Q. Doctor McEuen, how are you employed?

A. I'm employed by the State of Florida.

Q. All right. And in what capacity?

A. I'm an assistant director of the Community Tuberculosis Control Service of the Department of Health and Rehabilitative Services.

Q. I assume by that that you are a physician?

A. Yes, sir.

Q. Licensed in the State of Florida?

A. That is correct.

Q. How long have you been a physician?

A. In 1956, I've been a physician; yes,

sir.

Q. Have you practiced medicine regularly since that time?

A. Yes.

Q. And I take it from your position that your specialty is in the treatment of tuberculosis?

A. That is right.

Q. How long have you been involved in the treatment of the illness of tuberculosis, generally?

A. Since September 1959.

Q. Have you continuously worked in that field since that time?

A. That is right.

MR. PADOVANO: The -- I would tender Doctor McEuen as an expert. I don't see the need to go into her qualifications in detail unless counsel --

MR. HAYES: I stipulate.

BY MR. PADOVANO:

Q. Doctor McEuen, before I get into the testimony about the specifics, I'd like to ask you some general questions about tuberculosis. What -- could you tell me, generally, what type of an illness it is and what body systems it affects, if any?

A. It's an illness caused by infectious organism. It can infect any part of the body but most often it affects the lungs.

Q. Okay. And is there a typical symptom?

A. There are symptoms which are considered classical symptoms of tuberculosis, but many people with tuberculosis have minimal or no symptoms, but there are specific symptoms.

Q. What do you generally think of as a symptom?

A. The typical symptoms of tuberculosis are cough, chest pain, weight loss,

fever, night sweats and the degree of symptoms depends upon the degree of disease.

Q. You say that it could have an effect upon the lungs. Does it have an effect upon the respiratory system in general in most cases?

A. Yes, in most cases.

Q. And is it the kind of an illness which has the potential to limit a major life function such as breathing or walking or something such as that?

A. It could, yes.

Q. Now, during the course of your practice, have you had occasion to either treat or evaluate the plaintiff, Gene Arline?

A. Evaluate, yes.

Q. And could you tell us basically the time that you evaluated her and exactly what you were reviewing.

A. I've been -- basically evaluated her since 1959, since I started my --

Q. Let me ask you this: Have you seen her personally off and on during that period of time or --

A. Not as a patient.

Q. I see. But in the sence of evaluating the status of her illness; is that it? I'm not sure of the capacity that you have had in your contact with her and that's why I'm asking you. You were her treating physician?

A. By reviewing records and examining x-rays.

Q. When would you have occasion to do that?

A. When?

Q. Yes, ma'am.

A. Periodically during her treatment and following treatment.

Q. Would that routinely be done, in the

course of regular medical checkup, that a patient such as this would --

A. Yes.

Q. -- normally do? All right. Now, did you ever see her?

A. Yes.

Q. And how many times did you see her?

A. I saw her in the hearing before the school board and I also saw her in consultation at the Health Department on one occasion.

Q. All right. And are the records kept at the Health Department there; are her records kept at the Health Department?

A. The records are kept at the Health Department in Duval County, but we have records in our office also in Jacksonville.

Q. I see. Is this customarily the case in the unit that you work in? In other words, would you have records of tuber-

culosis patients which might be duplicated also?

A. Yes.

Q. And how far back does Mrs. Arline's medical record go that you have?

A. May I refer to my records?

Q. Yes, absolutely.

A. Thank you. March 1957.

Q. And then when did you first evaluate her?

A. Me as an individual?

Q. Can you tell that from the records?

A. May 1961.

Q. All right. And how long of a period of time did you monitor the records?

A. The last record we have is June -- is May 29th, 1981.

Q. So from '61 to '80 you were regularly -- I say regularly -- not necessarily frequently, but you were reviewing those records --

A. Yes.

Q. -- from time to time? Can you determine from the records whether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?

A. Yes.

Q. That is the case?

A. Yes, she did.

Q. Was she ever hospitalized with the illness?

A. Yes.

Q. And that appears in the records that you are referring to?

A. Yes.

Q. Now, let me ask you: During the course of your evaluation, did it appear to you at any time that there were ever any positive tuberculosis tests?

A. Yes.

Q. And could you summarize for me when

those occasions were.

A. Positive?

Q. Yes, from your record.

A. Originally in 1957 and then again in 1977 and in March of 1978 and in November of 1978.

Q. All right. Have you had occasions to -- you were, I suppose, familiar with her employment at the time that you were evaluating these records?

A. I was in 1977. I'm not absolutely certain that I was aware of her employment prior to that.

Q. All right. At any time did you have occasion to make any recommendations concerning her continued employment with respect to her -- the illness that you have evaluated?

A. Yes.

Q. And when was that and, if you will, please, briefly summarize what it was

that you had recommended.

A. It was in February, I believe, when the last culture was reported positive, which I think was February of 1979, and it was my recommendation at that time that she not continue to teach third grade students.

Q. Now, I don't wish to go into the medical basis for that in detail -- if Mr. Hayes wants to, he may -- but could you tell us just briefly why you recommended that?

A. Because small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses.

Q. All right. When you say "the pattern," you mean the overall record of the positive tests within a certain period of time?

A. Right.

Q. Did you classify the risk of her teaching small children in any way? Did you attempt to do that?

A. Yes. I think I said I thought it was very minimal at that -- you know, from then on, at that point.

Q. Okay. So would it be correct to say that you felt that there was a very low chance that she might infect somebody, but you thought it would be safer for her not to teach third grade?

A. Essentially, I think that's what I said.

Q. I don't mean to put words in your mouth.

A. No, I think that's --

Q. Was it ever your opinion that she should not perform any other form of work for the school board?

A. Well, I can't testify as to what

other -- as --

Q. What other work she could do; I understand.

A. I mean, for who she was working for, it was my opinion she could do other things, yes.

Q. And in your opinion what other things could she do?

A. She could work with older people or people who are not what we classify as highly susceptible groups of individuals, and --

Q. Would you have any -- now, you have testified that you think that the risk of her teaching young children would be minimal but you nevertheless believe it's a risk that should not be taken?

A. Right.

Q. Would you have any hesitation at all -- would you have had any -- we're talking about back; then I realize you

don't know what the status is today -- but would you have had any hesitation to recommend that she teach high school students?

A. At that time I think that would have been acceptable, yes, sir.

Q. Now, when you say acceptable, what do you mean by that? That the risk --

A. I mean that there is always a risk, but the risk is considerably lessened in older people who are not spending all day long in the same room with the same teacher. That's what --

Q. You are in the tuberculosis control center, you are more or less -- or one of the main functions is the risk control kind of idea?

A. Right.

Q. So if there was a risk in teaching older children, it was not one that was unacceptable in your view; is that what

you are saying?

A. That was --

Q. Does the fact that elementary school children, third graders, stay in the same room all day long, have anything to do with your recommendation?

A. Yes.

Q. And what would that be?

A. The longer the period of exposure to a possible case of tuberculosis, the more likely the possibility of infection occurring.

Q. And was that a factor which contributed to the --

A. That contributed to my recommendation.

Q. If she were in a setting with older students who go from class to class, would that -- would you feel more comfortable about that in that --

A. I would feel more comfortable about

that.

Q. And with students as old as high school students you would consider the risk acceptable --

MR. HAYES: Excuse me, Judge, I think -- I have not objected. I want to object to the continuing leading nature of this question.

MR. PADOVANO: I agree that's a little leading. I'm perhaps a little anxious to help the doctor get to her other appointment but I'll --

THE COURT: Rephrase your question.

MR. PADOVANO: Yes, sir.

BY MR. PADOVANO:

Q. Let me ask the question this way: At what age would you feel that the risk would become acceptable? I realize that's a qualitative kind of thing, but--

A. That's difficult. I think when you reach a point where the children are not

in the same room all the time, the risk is much less and that, perhaps, I would think might be acceptable.

Q. Would you have any difficulty in recommending her to teach adults in night classes, for example?

A. No.

Q. Would you consider that there is any risk for her to work in the school system in a nonstructural setting where she is around other adults?

A. If she -- around -- no, I would not.

Q. Okay. Is there any reason from a public health standpoint that she could not have performed some of those jobs?

A. No.

Q. Do you know the status of her health since the positive culture in February of '79?

A. She -- the last record we have is May 29th, 1981. At that time she was

negative.

Q. Do you know whether she has had any positive tests since then?

A. I do not. I have no record of them. I assume -- since it's a reportable situation, I would assume that it wasn't.

Q. I have just a few more questions.

Are there, to your knowledge, are there people who have had cases of tuberculosis in the past working in everyday life settings?

A. Yes.

Q. Are there many of those people? Are there people such as Mrs. Arline in the public school system or in other public forms of employment?

A. There are people who have had tuberculosis in other forms of employment. Other people who have had multiple relapses in teaching in the public school system, it is -- I am not aware of such a

situation.

Q. All right. Do you consider tuberculosis to be something which is necessarily disqualifying for public employment?

A. Tuberculosis in -- no, I don't; it's not, at this point, no.

Q. I asked the question in somewhat of an awkward way, but is the fact that someone has a record of tuberculosis necessarily a reason to deny public employment?

A. No, it is not a reason to deny. That in itself is not a reason.

Q. Is there any -- is there any reason that you are aware of from Mrs. Arline's personal health record to prevent her from working in a public setting other than under the conditions that you have set forth in your recommendation?

A. Wait a minute. Would you please word

that again? I was --

Q. Was there -- is there anything in Mrs. Arline's record which would lead you to believe that she should not be working in a public job other than in the setting that you would exclude her from, the third grade?

A. No.

MR. PADOVANO: Thank you. No further questions.

THE COURT: Cross-examination

CROSS EXAMINATION

BY MR. HAYES:

Q. If it please the Court.

Doctor McEuen, Mr. Padovano uses the word "public job" and I don't know what that is, so let me confine my questions to the school situation. So I understand and the Court understands, tuberculosis is infectious?

A. That's correct.

Q. How would you categorize it -- how would you categorize its infectiousness on a scale of one to ten? Is it highly infectious or minimally infectious?

A. I would say its probably medium infectiousness, if you are comparing it with something like chicken pox, for example, which is very highly infectious. In other words, everybody exposed to tuberculosis doesn't get infected, everybody.

Q. And the infectivity is largely effected through breathing; isn't that correct?

A. That is correct. Exhaling or respiration, coughing, sneezing, breathing.

Q. Also, as I understand, you spoke of cultures?

A. Yes.

Q. Is this the way medical science does

the classic diagnosis of tuberculosis?

A. That is right.

Q. And this is done in retrospect or in arrears of the disease; is it not?

A. It takes awhile for the culture to grow after the specimen is collected.

Q. How long?

A. It can take -- it can grow in two weeks, sometimes, but it -- we don't consider a culture negative for eight weeks. In other words, eight weeks after the culture is taken we report a negative culture; our laboratory reports a negative culture. We don't know that it's negative for eight weeks.

Q. So if a person were tested on the first of the month, it might well be the middle of the following month or further beyond that before it was found out that that person, six weeks ago --

A. This is right.

Q. -- had active tuberculosis?

A. That's right; it could be.

Q. In fact, it may well have been active for several months before that depending on when the next previous culture was taken?

A. That is correct.

Q. So that whatever -- whenever a person or a patient is discovered through this process, the chances are, if it's a positive culture, that that person has been infected for at least several weeks, perhaps several months?

A. Well, that's a presumption but it's a possibility, yes.

Q. Assuming the person has these tests only once a year and if the culture were taken and six weeks later proved positive we know, do we not -- and don't let me put words in your mouth -- for at least as of the date the culture was taken that

person was infected?

A. Yes.

Q. Do you consider Mrs. Arline to have a handicap?

A. To have a --

MR. PADOVANO: I object to that, your Honor. That's a legal conclusion.

MR. HAYES: Your Honor, I'd like to address the Court on that question.

THE COURT: Go ahead.

MR. HAYES: One of the burdens that the plaintiff must establish, of course, is that she is handicapped. There's been a great deal of testimony from Doctor McEuen about everything she can do. I think it's also a medical question, as well as a legal question, whether or not she's suffering from a handicap.

MR. PADOVANO: Your Honor, the only thing that comes into play is the definition of handicap and the act that we're

dealing under, and the act defines a handicap as an impairment of any major bodily function such as the respiratory system which has an impact upon the person's ability to carry on normal life functions. Now, she testifies to the facts and the Court makes the conclusion. She doesn't need to give the Court some of her own conclusions about whether the plaintiff is handicapped now or was then. I think it's a purely legal question.

THE COURT: Well, I think to some extent everybody is this room, including myself, is handicapped in some way, shape or form. I might have a sore back and that's a handicap, if I want to do certain things, or I might have a broken toe and that's a handicap. I think under the definitions of -- oh, what is it? -- 29 U.S. Code section 706, I believe it is, which is the definition of handicap, I'm

going to have to make that determination and I don't believe that in the context in which it was asked it's a proper question.

MR. HAYES: Thank you.

BY MR. HAYES:

Q. Doctor McEuen, you have indicated that a person who has had these relapses produces a pattern which is significant to the medical examiner; is that not correct?

A. Yes, I think -- right.

Q. For instance, had she been infected in 1957 and had now twenty-six years of positive cultures, it would be a different situation, would it not?

A. A positive culture?

Q. A negative culture.

A. Of negative -- yes, it would be a different situation.

Q. You testified that she's had one,

two, three, as many as four positive cultures in the last, well, certainly in the last twenty-four years, and it appears that the last three were close together. Is this significant, medically, the pattern of relapse, recurring with -- at closer intervals?

A. I -- I --

Q. Maybe I should --

A. Yes, it's a difficult question to answer.

Q. Let me rephrase this question.

A. Does this -- go ahead, rephrase it.

Q. Does the fact that there's continuing relapses as a person grows older -- first of all, is that medically significant?

A. Well, I wouldn't -- that would be, yes. That would be significant medically, I would think, people --

Q. And would the increasing --

A. I don't know whether I would draw

that conclusion from the pattern, that she was going to have continuing relapses as she grew older.

Q. Let's go up to '81. You indicated that she was seen in '57, you started evaluating her, I think, first in '61, she had a positive culture in '77, twice in '77, I believe once in '79 and a negative in '81.

A. The one that was reported positive in 1979 was obtained in November of 1978.

Q. I see, I see. Is this history, that is, history of Mrs. Arline, is that significant as far as a relapse history to you?

A. Yes, it was. At the time that I made the testimony then and -- you know, it -- back whenever that was, the last time, it -- it's -- it worried me that she might continue to have positive cultures or positive -- or relapses. This --

Q. That's what I'm getting at.

A. Right; yes.

Q. Does the fact that she's had some twenty-four years after she was first diagnosed as having the disease, does the continuation of these positive cultures, these relapses, is that significant to show that the disease is still present or at least it's dormant or it's present in its dormant stage?

A. I think I said -- I'll say the same thing I said before: I hope that Mrs. Arline is cured, I hope that she will never have another relapse. We are fairly confident that she probably will not. In other words, I can't say -- I know you're trying to make me say she's going to continue to have relapses, I think, and I can't say that.

Q. Of course you don't know?

A. I don't know, but I can't say. I

just -- hope that this is the case.

Q. Do you know how many years in fact she went between relapses?

A. Between the first episode and the second, it was a period of twenty years.

Q. And then they followed more closely?

A. Right.

Q. Now, you categorized the medical risk, of course, and realizing you had to make a judgment on that and I believe at the hearing before the school board, the school board made a judgment on the risk that they felt was acceptable. You indicated susceptible children and other susceptible persons, I think; is that your words?

A. Yes.

Q. That doesn't necessarily include just small children?

A. No, it doesn't necessarily include just small children.

Q. For instance, in a night school setting, as you know, there are sometimes all different types of people in night school setting --

A. Yes.

Q. -- older people, retired people --

A. Uh-huh.

Q. -- people with various other illnesses. Would that affect, depending on the makeup of those adults, say, in a given class, would that affect or perhaps affect your opinion as to whether or not they were susceptible and the risk was susceptible?

A. Well, you have to -- there is always a risk of something sometime and you have to decide what is a risk. I think the chance of there being such an individual in such a situation, the chance of Mrs. Arline becoming infectious and the chance of that person becoming infected is so

remote that I would consider it an acceptable risk.

Q. So an acceptable risk from a medical standpoint?

A. Yes.

Q. Now, the main risk or the risk that gives you most concern is small children in a confined classroom?

A. Right.

Q. Were you aware, for instance, that the only certification she holds is in elementary education?

A. I am not aware of her certification.

MR. HAYES: Thank you -- excuse me. Thank you very much, Doctor. No further questions.

THE COURT: Redirect?

MR. PADOVANO: I have no redirect.

THE COURT: All right. Doctor McEuen?

A. Yes, sir.

THE COURT: If I may just get some --

something straightened out here. Is there any immunity to tuberculosis?

A. Very little, if any, immunity to tuberculosis. Does not produce an immunity like you get from chicken pox, for instance.

THE COURT: Okay. Well, I'm not talking about someone --

A. There is some immunity in -- there is the basis for which there have been BCG vaccinations with the presumption that there may be some, but it's a very low immunity.

THE COURT: Okay. But it requires a vaccination even --

A. Well, no -- I mean, yes, it would, but there is very -- it's a very low questionable immunity. I want to make it clear it's a very low and questionable immunity.

THE COURT: Well, what I mean, basi-

cally is can a normal person walking around the street who has never been vaccinated, could they have some immunity to tuberculosis?

A. I'm sure everybody can have a natural degree of some degree of immunity, but it would -- for instance, only twenty percent of household contacts of infectious cases of tuberculosis become infected. You see, it is not -- you know, so you have got to say that some people must have some degree of natural immunity, but it's very low.

THE COURT: Okay. You said that small children were highly susceptible?

A. That is the general belief; yes.

THE COURT: Now, I assume that that's on a relative basis?

A. Yes --

THE COURT: When you say "highly susceptible," you're talking, let's say,

that twenty percent you just mentioned, that small children would more likely be susceptible than would older children or adults?

A. Yes, that's considered to be true.

THE COURT: But in any event, with everyone there is some susceptibility; is that correct?

A. That is right, yes.

THE COURT: So that whether it be adults or teenagers or small children, they're all susceptible; it's just a matter of degree --

A. Right.

THE COURT: -- of how much and the conditions under which they would be in contact --

A. Yes, yes.

THE COURT: -- with the person who is --

A. The chances of getting tuberculosis

would depend on three -- the infectiousness of the case, the length of contact and the susceptibility of the individual.

THE COURT: So there are people who are more susceptible than others?

A. Yes.

THE COURT: And that might depend on their own metabolics or metabolism or their own physiological structure?

A. Yes; right.

THE COURT: You said there was a positive test in 1957, another one in 1977?

A. Yes.

THE COURT: Another one in March of '78 and another one in November of '78, I believe?

A. Yes. There were others, a few others also in between, I think. If you're talking about positive cultures, there were -- there were a few others but that

episode was --

THE COURT: Well, my question was going to be that between 1957 and 1977, which I assumed were the only two in that period that were positive?

A. Right, uh-huh.

THE COURT: -- were other tests made which were negative?

A. Yes.

THE COURT: And how frequently were those tests made?

A. In the earlier part of the time they were probably done on -- let's see if I have a record -- they were probably done about three-month intervals and later on an annual basis, probably; I don't have a record of that. Our records are not that complete, so I'm only saying what I think is probable, but our records are not that complete, and the record which the laboratory gave me does not go back

before that period of time, does not go back before 1977.

THE COURT: Okay. One of the three factors which you mentioned was the infectiousness of the, I guess you would call it disease, that was carried by the person who had tuberculosis?

A. Pardon me?

THE COURT: I said one of the three factors with regard to others being susceptible to this is, I believe in your words, the infectiousness of the disease carried by the particular person?

A. Yes.

THE COURT: Is there any way to measure that infectiousness?

A. It's generally measured by -- you know, it's relative. If the person is positive on smear, in other words, if you examine under the microscope sputum of a person, that the person coughs up and you

can see the germs, the acid-fast bacilli, then that person would be considered more infectious than a person if you could not see the organisms on smear. It would -- presumably there would be fewer organisms present. The number of organisms or the amount of growth which occurs on the culture is also another way of estimating how infectious a person is, whether you have a whole lot of growth or just a few colonies of growth. That tells you about that one particular specimen. It doesn't really tell you about others, you see, but it's a good -- it's our best way of estimating infectiousness.

THE COURT: So all of this is somewhat inexact then?

A. That's right, uh-huh.

THE COURT: Is there any rating scale that you in your profession have to rate a particularly infectious person with

another infectious person?

A. We don't have a rating scale but, you know, I could give you an opinion, relatively speaking.

THE COURT: All right. Was Mrs. Arline rated or do you have an opinion as to --

A. No.

THE COURT: -- as to the infectiousness of her disease?

A. I have an opinion of the infectiousness of her disease and I think at the present time the possibility of her being infectious is remote.

THE COURT: But as of 1979?

A. As of 1979 the chance -- as I said then, at that point we had a group of positive cultures within the previous almost two calendar years and really three academic years which were positive which I thought was an unacceptably high risk at that time, highly infectious, not

-- in 1979, but not highly infectious, but, you know, acceptable.

THE COURT: Okay. Thank you very much, Doctor McEuen. You may be excused.

CRAIG MARSH was called as a witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. PADOVANO:

Q. Mr. Marsh, you are the superintendent of schools for Nassau County, Florida?

A. Yes, sir.

Q. And you were the superintendent of schools, '78-1979?

A. Correct, sir.

Q. During the events in question here?

A. Yes.

Q. Now, let me see if we can just cover one preliminary matter very quickly. I think we have all pretty much agreed that Mrs. Arline was dismissed at the end of

the year of '79. Is that the order that was entered ultimately reflecting the dismissal?

A. Yes, sir.

Q. Now, the date on this is somewhat later. Could you explain briefly why it took so long to get the order?

A. I don't -- I don't exactly understand what you are getting at, Mr. Padovano.

Q. Let me withdraw the question. This is the original order, I think. There were two orders, were there not, two hearings in the case?

A. Oh, yes, there was.

Q. And there was the first one in August of 1980, reflecting the dismissal, the -- for the preceding year?

A. Yes.

MR. PADOVANO: I would offer this as Plaintiff's Exhibit B.

MR. HAYES: No objection.

THE COURT: Be received.

THE CLERK: Plaintiff's Exhibit B
received in evidence.

BY MR. PADOVANO:

A. Now, that -- the way that you worked, that was a year-end dismissal. She was actually terminated before the end of the year but paid to the end of the year; correct?

A. Right.

Q. So that her pay stopped as of the end of the '78-'79 school year?

A. Right.

Q. Now, she was -- she has testified that she was making twelve thousand five hundred dollars per year, is that correct, to the best of your knowledge?

A. Probably in the range, yes.

Q. And she, not being in the school, did

not seem to be aware of the increases that might be in effect there. Can you tell us how much she would have made had she been employed from that time to this?

A. An estimation? I have no way of looking -- without looking at the records, but it would be in the range of eight to nine percent per year for probably the next two to three years.

Q. Let me just ask you this without going through the precise calculation of it here because I want to move to another point: What would the least that it could be -- what would be the least amount that it could be?

A. No less than she made the year before.

Q. Multiplied by the number of years with an eight percent increase?

A. Approximately eight to nine percent

increase, yes; yes, sir.

Q. So if we were to multiply that out we would be able to figure out mathematically how much money she would have made?

A. Sure.

Q. Twelve five times eight percent each year for the years?

A. Yes.

Q. Now, let me ask you this: The order that we've referred to here, now this was obtained at your recommendation to the board; was it not?

A. Yes.

Q. And could you tell us approximately when you made that recommendation?

A. Going back in the history, in the spring of 1978 I got a letter from Doctor Lund with the State Health Department, who is located in Fernandina Beach, stating that I had stated in effect that

this was the third time that Mrs. Arline had shown up with tuberculosis -- active tuberculosis in a period -- a short period of time, and her recommendation was that she be removed from the classroom. And this was, I believe, in May 23rd or sometime around the end of school, and I went out and met with the principal prior to this particular date, or to the letter being received from Doctor Lund. I didn't personally know Mrs. Arline; I came in office in January of '77. I didn't know everybody in the school system. So I went out and talked with Mrs. Arline and verbally suspended her at that time with pay for the remainder of the school year because in --- from Dr. Lund's statement -- and it was very friendly, and told Mrs. Arline it was not because she had done anything

wrong, but due to the circumstances beyond her control felt like it would be better for the children, her and everybody concerned, that she just not come back for the rest of that particular year.

Then, in looking into the situation found that there had been, I believe, a case in the summer of 1977 and then found the record where that doctor course, I believe, had recommended later on in that year that she could come back to work, and I think that was '77-'78 school year.

Then, well, you have heard the testimony as to what happened since that time from Doctor McEuen. There was a sputum test that was taken sometime in November and it was later on, six to eight weeks later we got notification that it was positive and that -- then we suspended --

I suspended Mrs. Arline with pay until the next -- the next regular board meeting, and it was extended and subsequently led to dismissal hearing by the board and --

Q. All right.

A. Would you like me to continue?

Q. But you did make a formal recommendation to the board to dismiss Mrs. Arline?

A. That's --

Q. At the close of that year, at some point in the spring?

A. That's according to law, yes.

Q. And your specific reason for that recommendation was her illness?

A. Yes, sir, continued reoccurrence of tuberculosis.

Q. Now, it is correct, is it not, that there was no other reason for her dismissal or for your recommendation to the board?

A. That is correct.

Q. In other words, you have never contended that she was a bad teacher or an incompetent teacher?

A. That is correct.

Q. Or that she had been guilty of some act of misconduct or something such as that?

A. That's also correct.

Q. Based solely on the illness?

A. Correct.

Q. Now, your recommendation in that regard, did that come about as a result of the test that Doctor McEuen described to the Court?

A. The --

Q. November of '79 -- I'm sorry, it would have been February of '79?

A. That was part of it. Complete medical condition of Mrs. Arline.

Q. Did you discuss the matter with Doctor McEuen?

A. Yes.

Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?

A. No, sir, I did not.

Q. In other words, you made no attempt to ask the doctors whether or not she could safely teach adults or high school students; would that be correct?

A. I didn't pursue it; that's correct.

Q. All right. Just so we understand, you really didn't make any effort to accomodate her for her illness at all,

did you? In other words, you were just concerned with removing her from the classroom?

A. Yes, sir, I sure was.

Q. And it is a fair statement to say that it wasn't your intention to try to accomodate her and see if she could work in some other capacity?

A. No, sir. I was concerned about the entire school system, Mr. Padovano.

Q. But in making your recommendation, you had no concern over whether or not she could be placed in another position is what I'm asking you; isn't that correct?

A. Yes.

Q. Now, Mrs. Arline is certified in elementary education; correct?

A. That's correct.

Q. She has a continuing contract of

employment?

A. She had.

Q. She had. Been canceled at that point; correct?

A. Correct.

Q. Now, that continuing contract of employment does not require her to teach in any particular grade does it?

A. The contract does not, no, sir.

Q. In other words, under the contract -- not talking about certification yet, but under the contract she could actually teach in the twelfth grade, could she not?

A. Sure.

Q. The eleventh grade or tenth grade or any other grade; is that correct?

A. Yes, sir.

Q. Now, her certification is limited to elementary school but it is a fact, is it

not, that you have teachers teaching outside their field of certification?

A. Yes, we do.

Q. In fact, it's your position, is it not, that you would rather let somebody teach outside their field than to let them go altogether?

A. Not necessarily. It all depended upon the circumstances surrounding that particular case.

Q. All right. But you do have teachers outside their field of certification?

A. Yes.

Q. Is there a state policy that you are aware of that allows you to do that, and if so, for how long a period of time?

A. We require -- state policy -- well, the state statute says you try to get people that are certified and put them in the classroom teaching children. It is a

local option that we are allowed to allow people without certification to go into a particular field if they will work toward certification in that field.

Q. All right. Now, Mr. Hayes had made the point with Mrs. Arline that she didn't seek to become recertified, but now it is a fact that you didn't offer her any other job in a different field to begin with, now, did you?

A. That is correct.

Q. And if you had offered her another job, let's say, teaching the twelfth grade, that she may very well have complied with your condition to seek recertification in secondary schools?

A. That's conjecture, sir; I don't know.

Q. But in any case she didn't have a job offer to attempt to comply with from you?

THE COURT: You are getting a little

repetitious now. He didn't offer her anything else; he said he didn't.

BY MR. PADOVANO:

Q. What -- did you have other positions -- you have other positions in the school system besides elementary school positions, obviously, do you not?

A. Yes.

Q. You have some high school positions?

A. Yes.

Q. You have some adult education positions?

A. Not positions, we don't -- our adult program is part-time teaching and we don't -- do not offer numerous classes on a regular basis; at particular semesters. There may be one or two classes offered, so we don't seek positions in there. We take people who are already in the school system generally certified in the area of

the particular adult courses being offered and it's taught at nighttime. We don't have an adult school per say as they do in larger districts.

Q. You do have a variety of non-instructional positions, do you not?

A. Yes, sir.

Q. Now, it is the case, is it not, that sometimes when you have a teacher who has to -- legally has to work but you don't prefer to have them in the classroom, that you can get them doing a job in some capacity in administration?

A. That didn't happen.

Q. Didn't happen in the case of Vashti Garrett?

A. No, sir.

Q. What was Vashti Garrett doing when she was reinstated, what was she doing?

A. She was teaching at the Fernandina

Beach Junior High School at the time when she was -- that I recommended dismissal.

Q. And then when she was reinstated what was she doing?

A. She was a substitute teacher. Full-time substitute teacher.

Q. There are some of those positions available as well?

A. No, sir.

Q. In other words, if you didn't want to put somebody in full time as a teacher?

A. No, sir. That was the first position we've had of that sort in our county and not another position available at this time. But in that case I might add that she might go through a K through 3 school today or for a week and then maybe have a 10 through 12 school or 7 through 9 school, so you never know from day to day

what particular school you're going to.

Q. Well, I understand. Let me just ask you this: It is true, is it not, that some of these positions have come open in the adult education and in the secondary education since her dismissal?

A. Oh, yes, we've had positions.

Q. And have you ever offered her any of those positions?

A. No, sir, we have not.

Q. But now you have heard Doctor McEuen testify that she could safely work in one of those positions, why haven't you offered her --

A. I also heard her testify that anybody was susceptible to tuberculosis, Mr. Padovano. You say why haven't I offered her one?

Q. Yes.

A. Yes, sir, that is -- as I was -- the

history is such that there was an appeal to the State Board of Education who reversed the Board's decision. Later on we appealed and the First District Court of Appeals in Tallahassee dismissed, upholding the Board's decision, and we're -- I, as chief administrative officer of the board, and the board, itself, are by law charged with the health, safety and welfare of children. And there is a danger. I know it's less danger according to Doctor McEuen's testimony so far as older people are concerned, but I felt like that for the benefit of the total student population and further personnel in Nassau County and the public benefit, that it would be best if -- not to continue or offer Mrs. Arline any employment.

Q. But she said as a public health pro-

fessional that she thought it would be an acceptable risk; do you disagree with her in that regard?

A. Well, hers was a medical opinion and I'm using her medical opinion too. I have a responsibility, as I said, to the school board for the health, safety and welfare and the operation of the school system, and in our opinion we don't feel like that we are to offer Mrs. Arline a position.

Q. Is there some question involved in this other than a medical question in your judgment?

A. Very definite. In the public sector or in employees of the school system, as I said twice already, that you are charged with the health, safety and welfare, not just -- not just as a -- that's state law, that the board and the

superintendent is charged with that responsibility for the protection of the children and of the employees, and that is a basis for the total action that's been taken too.

Q. All right. Let me ask you a few questions on another subject and I'll be finished with this.

On the question of Title I funding -- first, let me ask you this. Does this appear to be your Title I application, a copy of which has been introduced as an exhibit before the Court?

A. Yes, sir, it appears to be.

Q. All right. Now, are you familiar with the process of applying for Title I funding?

A. Yes, sir, I am.

Q. You have participated in that to some degree?

A. Yes, sir, quite extensively.

Q. Are you aware of any conditions that are placed upon the school district in order to receive Title I funding?

A. Yes, sir.

Q. All right. Now, those conditions that are written into your application grant, are those conditions things that you put in there or are they required by some federal regulation or --

A. Mr. Padovano, so far the testimony has been given is not exactly correct as far as Title I project is concerned.

Q. How would you correct it?

A. Well, Title I or Chapter I presently is a federal assistance program which you first receive funds based upon the number of economically deprived children in your school district. You serve those children that are educationally deprived.

Now, there is some overlapping in the two populations, but the target population first for entitlement, dollar entitlement, is economically -- economic deprivation, or serving of children is educational deprivation. Most of those children are exactly the same. However, there are certain children that are not economically deprived that do get to serve -- get the services of Title I and consequently also some of those that are economically deprived do not get the services of Title I. The reason being that once you have identified the number of economic deprived children, that's by a specific method of the number of children that are given free lunches on a given date the previous year, exact date has to be taken, that count has to be taken, gives you that number and it's so

many dollars for each child that you receive. Okay. Then for your population that is served with educational services you have to administer a test, of which the same test is given to every child in the school system because you have to make a comparison with every -- your total school population, and those who score below a certain percentile to be identified as possible Title I recipients.

So each spring -- and we use exactly the same test each spring. That test is administered to all children in the school system in grades K through 12. From those test scores we look at each grade level independently, K-1, 2, 3, 4, 5, 6, and identify those numbers of children in -- and you are controlled by the number of children you can serve,

what the total fact there is, the total dollars you get, because as a third factor that helps to control this and that is that you are allowed a specific expenditure per child. That ranges from three seventy-five to two hundred fifty dollars per child. So you have to divide that into the total allocation for the particular year to get the total number of children you can serve. Looking at the test scores you will come starting from the lowest percentile going up, ascending, you will come to a number that is a cut-off number. And those are the children that you serve in the particular program.

Now, as I said awhile ago, that test is given to every child in the school system and you have to do this. There is no separate test given to identify Title

I children. It is a CTBS test in Nassau County and that's given on a yearly basis. Now -- that's about it as far as anything else -- to answer your question at this time.

Q. I understand that. But it is true, is it not, that the Title I program may not be operating in a given school or a given classroom because there may not be students in that school or classroom who meet the need?

A. Yes, sir. But, now, the reason for not being in a particular classroom is because of administrative reasons. Now, in our particular county -- and here again to clarify some previous testimony, we do not serve anything except K through 6 students. We don't serve any junior high schools, although that some of them were identified, some of the schools were

identified as being able to receive Title I funds, and that's a long story, too, but -- so we do not serve anyone but K through 6 students. But every K through 6 school in the district that qualifies for those services -- and I believe in this year all sixty-seven schools did -- one of the schools do not now -- but all of those that qualify did have a program written, and to be according to the federal guidelines, state guidelines, and then it was developed in-county by the Title I administrator and myself. And all the principals of those schools who would be recipients of Title I funds.

Now, for each individual school, to answer your question specifically, there may or may not be Title I students in each and every class, but that was a decision written into the program of

which the principal and only the principal had the -- could make. Some schools chose to have all students in a class as Title I, some of them told to have -- to equalize the class, classes throughout the entire school with equal number as much as possible of Title I students.

Q. I want to ask you a question about the conditions that appear to be placed upon the receipt of this money in terms of the participation of non-Title I teachers who come into contact with Title I teachers, whose conditions that are written there on the document there in front of you. First of all, who prepares that; did the school board prepare that?

A. Yes, sir.

Q. How was this prepared? Was it prepared according to some federal rule or

regulation or was this --

A. Within federal guidelines, but they give you quite --

Q. Leeway?

A. Yes, sir, they do. That is -- that was prepared by myself, Miss Holliday, who was Title I supervisor, and all the principals. Now, it could have been written a-number of different ways, but that's the way we wanted it in Nassau County. The answer to your question, it is written in there that the Title I teacher shall work with the classroom teacher and his regular classroom teacher in planning for those children that she's serving in Title I. There is educational reasons for that. We don't want a program sitting over here that has no connection whatsoever with the classroom program here. Students being in Title I

program that were deficient in certain identified skills which we identify through tests, and further testing in the Title I program, it would seem less than educationally sound to let the Title I teacher be working on some kind of skills and the classroom teacher other skills. Their efforts together. And it would take some communication. And that's written in there not because of federal guidelines, state guidelines.

Q. But this is the condition that you set upon yourself for the use of this money?

A. Well --

Q. I assume?

A. Yes, sir.

Q. And you follow those conditions?

A. Not use of the money, no, sir, no, no. In the administration of the program.

Q. Of the program?

A. Okay.

Q. Okay. But did you follow these conditions that you told the federal government you would follow after you got the money?

A. Yes, sir.

Q. So, in other words, in the typical case, for example, condition G, the regular teacher -- that would be the teacher like Mrs. Arline; right? "The regular teacher will diagnose the reading difficulties of target children." That would be a Title I child; right?

A. Yes, sir.

Q. "With the aide of the Title I teacher. Conferences will be held as often as possible to develop appropriate prescriptions for the pupils to provide, by mutual agreement, day-by-day strate-

gies for reading improvement."

A. Yes, sir.

Q. So under the conditions that you, yourself, set up, the regular teacher participates in the program daily with the Title I teacher; correct?

A. No, not in the Title I program, sir, they do not participate in the Title I program. Administratively we require the regular classroom teacher and Title I teacher to communicate with each other for the benefit of the child to try to identify those skills that the child is deficient in, and both of them can be working on those skills with different approaches and different methods. But so far as being in the Title I program, no, sir, they're not.

Q. Well, I don't know how you define in the program, but you would admit, would

you not, that they worked on a day-to-day basis with the Title I teachers to improve the reading skills that they, the Title I teachers, were working on?

A. Yes, sir.

Q. And the -- now, there's been some testimony that you have received some federal impact aid, which is the small portion of your overall budget?

A. Yes, sir.

Q. Is that correct, first of all, that testimony?

A. Yes, sir.

Q. Now, it is a fact, is it not, that a portion of that money was used -- albeit a very small portion -- to pay Mrs.

Arline's salary?

A. It's put into the general fund and it's impossible to trace --

Q. It's distributed evenly among all of

the expenses. In other words, you could create a ratio from the federal funds to the total expense and you could figure out exactly how much of that money goes into each expenditure that the school board makes; correct?

A. I suppose it would be possible. It was -- let me back up a little bit, statement I just made. We don't distribute exactly like that. We have a -- the money, as has been testified here, is in lieu of taxes because of some Government installation, as an incentive to the particular school. And here again you qualify for that by taking -- they give you a date certain on that also, I think it's October 17th or something which you send out cards, impact cards to all the schools, principals of all the schools. They try to identify and send those cards

home and get the parents to fill out the cards, and which qualifies them for certain impact funds. You have several different categories. Have the category of A, B, C and D and -- no need to go into that, but I do have four categories of funding and it's different amounts of funding. As an incentive, we knew that there was a past number of students or parents who may qualify in our district that we were not getting cards filled out on, so as an incentive to try to get additional dollars like that we offered so much per card that was -- that met the criteria for funding, to be distributed directly back to the particular school, all thirteen schools in the county, and it picked our impact funds up and we've been --

Q. So -- but you when you get the funds

though there is no indication in the budget though how they are distributed?

A. Not the one that goes in the general fund, no, sir.

Q. And you can't say they go for one purpose or another, can you?

A. That is correct.

Q. So you could create a ratio of that fund to the total fund and figure out how much money was used for each expenditure in the budget now, could you not?

A. That is correct.

Q. And there would be some of that money attributed to Mrs. Arline's salary, although it would be a very small amount of money; wouldn't that be correct?

A. Yes, sir.

MR. PADOVANO: I have no further question.

THE COURT: Cross-examination

CROSS EXAMINATION

BY MR. HAYES:

Q. Mr. Marsh, as a superintendent, do you know how many school districts in Florida receive some of this federal impact aid?

A. I don't have the number, Mr. Hayes. Quite a few of them do, I know that.

Q. And I believe it was your testimony that this is merely replacements dollars, you have these monies if there were not these federal installations?

A. That is correct.

Q. So I understand it quite clearly, your testimony, you have indicated in answer to Mr. Padovano's question about Mrs. Arline's condition you felt an obligation under state law towards the population of the county, the students in the county and et cetera. Would you explain

that?

A. Well, just an obligation under state law, but a moral obligation, too, as I stated a while ago, that I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all -- after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it in the best interest of the school system of Nassau County that she be dismissed from the classroom.

Q. In making that recommendation, did you have input from other members of the county staff and parents?

A. Very much so, yes, sir.

Q. Was that a factor?

A. Yes, sir, very definitely was.

Q. There's been some talk about adult school and night school. What type of students does that include in your adult education?

A. Most of them are older students, I say grown people. Now, we do have some school dropouts that we will allow to come into night school, adult school, but anywhere from seventeen to fifty years old.

Q. Seventeen to age fifty. Are your elementary schools departmentalized, if you know what I mean?

A. No, sir. I think there's maybe a couple at the sixth grade may have changed classes, but primarily self-contained classrooms.

Q. Maybe the Judge knows, maybe he does

not. Self-contained classroom means what for the record?

A. That means a teacher has a -- is responsible for a classroom of students the entire day unless the students are pulled out for other types of special activities.

Q. And Southside Elementary School where Miss Arline taught was not one of the special departmentalized programs, was it?

A. That is correct.

Q. To your knowledge as superintendent of schools during -- or since 1976, has Mrs. Arline at any time been employed in any position or in any way received any funds for participation in a program that was the beneficiary or that came from specialized earmarked federal system funds?

A. She has not.

Q. What was the source of her salary?

A. General fund, state and county taxes.

Q. To your knowledge did she have any special supplements or any other positions within the county that may have received federal -- earmarked federal funds?

A. None, sir.

Q. Do you have an opinion as superintendent of schools and one being knowledgeable, I assume, in budgets and sources of revenue as to whether or not Mrs. Arline, prior to the year -- the year prior to her dismissal, was participating in a program that was a direct recipient of federal financial aid.

MR. PADOVANO: I object --

A. She was not.

MR. PADOVANO: -- first of all, because

the -- the question doesn't assume the correct statement of the law. Secondly, because it's a legal matter for the Court. I don't think this witness can give the ultimate conclusion of the case.

THE COURT: Let me hear the question.

(Question read by reporter).

THE COURT: Sustained.

BY MR. HAYES:

Q. All right. Under the Title I program, your various schools, Mr. Marsh, are all of your school personnel, including principals and other teachers, required to cooperate with the Title I program?

A. Yes, it is one of the several programs in the school; yes, sir, that is true.

Q. Does this require cooperation of all

--

A. Yes, sir, it does.

Q. -- teachers and administrators?

A. Yes, sir.

Q. Are there other programs in which teachers --

A. Yes, sir.

Q. -- cooperate with no extra remuneration?

A. Yes, sir.

Q. For instance?

A. Rather extensive exceptional child education program.

Q. And how does the regular staff participate with those programs for no extra remuneration?

A. Well, we have -- some of those are self-contained programs like educable mentally retarded class would be a self-contained class in which the students would stay with the teacher the majority

of the day except for some pull-out maybe for PE and art activities. Others are part-time, and identified as part-time in which an SLD, specific learning disability child, or emotionally handicapped child, may leave the regular classroom for a period of time every day or twice or three times a week, and of course the special teacher there works with the classroom teacher to try to help that classroom teacher and be able to cope with and do a better job with the child while they are in the classroom during the period of the time.

Q. Let me ask you: To your knowledge did your predecessor or the current board, prior to your being informed by whatever the doctor's name again, Doctor Lund, was it --

A. Lund.

Q. -- was that the first knowledge you had of Mrs. Arline's tuberculosis?

A. That was my -- my first knowledge, yes, sir.

Q. Did you review her official application, her application contained in the personnel file to determine if that information was contained on her application?

A. Yes, sir.

Q. Let me hand you what's been identified as exhibit -- Defendants' Exhibit

A. Do you recognize that?

A. Yes, sir.

Q. What is that a copy of?

A. Her application for employment.

Q. You have reviewed the original application and the school file. Is that an exact duplicate, machine copy of that?

A. Yes, sir.

MR. HAYES: Your Honor, realizing we're still on the plaintiff's case, but to same time for recalling --

MR. PADOVANO: I don't have any objection.

MR. HAYES: Mr. Marsh, I would offer this as Defendants' Exhibit A at this time -- Defendants' Exhibit 1 at this time.

THE COURT: Be received.

THE CLERK: Defendants' Exhibit 1 received in evidence.

MR. HAYES: Thank you. I have no further questions.

THE COURT: Redirect examination?

MR. PADOVANO: No redirect, your Honor.

THE COURT: Pardon?

MR. PADOVANO: No redirect.

THE COURT: All right. Thank you, Mr. Marsh.

SUPREME COURT OF THE UNITED STATES

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA
AND CRAIG MARSH, INDIVIDUALLY AND AS
SUPERINTENDENT OF SCHOOLS OF NASSAU
COUNTY, FLORIDA v. GENE H. ARLINE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-1277, Granted April 21, 1986

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, limited to Question 1 presented by the petition. In addition, the parties are requested to brief and argue the following question:

“Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being ‘otherwise qualified’ for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794?”

JUSTICE STEVENS, dissenting.

The Court of Appeals remanded this case for further proceedings, and concluded its opinion as follows:

“In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on

the school system. Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding ‘duty to the public it serves.’ Section 504 by its existence establishes that such a duty cannot be used to shield any entity from liability for making decisions which ‘arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.’ *Southeastern Community College*, 442 U.S. at 412, 99 S. Ct. at 2370. We therefore remand this case for further findings as to whether the risks of infection precluded Mrs. Arline from being ‘otherwise qualified’ for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system.” App. A. to Pet. for Cert (footnotes omitted).

In my opinion, it is inappropriate for this Court to direct the parties to present argument on the “otherwise qualified” issue before the District Court has an opportunity to make the findings ordered by the Court of Appeals. It is especially inappropriate because petitioner did not seek review on that issue. Accordingly, I respectfully dissent.